**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**ORDINARY ORIGINAL CIVIL JURISDICTION**

APPEAL (L) NO. 1016 OF 2005.
IN
SUMMONS FOR JUDGMENT NO. 898 OF 2001.
IN
SUMMARY SUIT NO. 1721 OF 2001.

Shri Venkatesh Chemi-Colour Co.& ors.. Appellants.

V/s.

Shri Hatim Suterwalla & ors. ... Respondent.

Shri H.J. Thakar, Senior Counsel with M.K. Nesari for the appellants.

Shri Cyrus Ardeshir with Shri N.R. Modi and Miss Falguni Thakkar i/b Rustomji & Ginwala for Respondent No.1.

**CORAM : V.C.DAGA AND J.P.DEVADHAR, JJ.**

**DATED : 19.10.2005.**

**P.C. :**
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. Heard. Perused plaint, appeal papers with affidavit and counter-affidavits and correspondence between the parties.

2. This appeal is directed against the order of the learned Single Judge dated 6th September 2005 granting leave to defend in Summary Suit No. 1721 of 2001 subject to deposit of Rs. 30 lac within the period stipulated in the order.

3. The factual matrix reveal that the summary suit for the recovery of Rs. 31,39,809/- filed by the plaintiffs- respondents was based on the 5

dishonoured cheques amounting to Rs. 30 lacs with interest thereon in the sum of Rs. 1,39,809/-. The defendants appeared and sought leave to defend suit which was granted by the learned Single Judge by impugned order, which is a subject matter of challenge in this appeal as stated hereinabove.

4. Shri H.G. Thakker, learned Senior Counsel appearing for the appellant submitted that Payee's Account cheque ceases to be a negotiable instrument as such presumption under section 118 of the Negotiable Instrument Act is not available and that the learned Single Judge was in error in drawing such an inference. As an extension of the same submission, Shri Thakkar further submitted that the summary suit as filed is not maintainable on the basis of payee's account cheque since it is not a negotiable instrument.

5. In the facts and circumstances of the case, it is not necessary to rely on the presumption raised under section 118 of the Negotiable Instrument Act. The very fact that the undated cheques were handedover under covering letter dated 30th October, 1999 with an admission that the cheques were being handed over towards part payment of the amount due is sufficient to presume that the cheques were given to discharge liability incurred

by the defendants. Assuming that payee's account cheque ceases to be a negotiable instrument nonetheless it will be a Bill of Exchange. Once it is held to be a Bill of Exchange, summary suit is perfectly maintainable on the basis of such instrument.

6. If such undated cheques were handed over towards part payment of liability, implied authority to put date thereon could very well be inferred; such authority is prima facie; implicit in the letter dated 30.10.1999. Only requirement was to keep the drawer informed about the intention of payee to realise the cheques. As a matter of fact, appellant is estopped from pleading invalidity of the instrument under section 120 of the N.I. Act; as the said provision is very much applicable to a cheque. Estoppel is based on the maxim "**allegans contraria non est audiendus"** ( a person alleging contradictory facts should not be heard), and is that species of presumption "**juris et de jure"** (of law and right), where the fact presumed is taken to be true, not against all the world, but as against a particular party, and that only by reason of some act done. Estoppel is based on equity and good conscience and the object is to prevent fraud and secure justice between the parties by promotion of honesty and good faith and by preventing them from

approbating and reprobating at the same time- (see **R. S. Maddanappa v. Chandrarama AIR 1965 SC 1812).** Estoppel is nothing but the carrying out of what the parties as honest men must have intended, if they thought about the matter at all at the time they made their bargain.

7. The plaint makes out a specific case of borrowings by the defendant from time to time which has not been, specifically, denied. General denial in the counter affidavit is no denial in the eye of law. It is not in dispute that the appellants are maintaining account books. Ledger extract to disprove borrowings has neither been pleaded nor produced by the defendants to rebut the adverse circumstances which speak for themselves.

8. This is a fit case for drawing adverse inference against the defendants for not producing their account books. The Apex Court in the case of **Krishnaji vs. Mohd. Haji, AIR 1968 SC 1413;** held as under:

> . "Evidence Act (1872), Secs. 114(g) and 103- A party in possession of best evidence which would throw light on the issue in controversy witholding it- Court ought to draw an adverse inference against him notwithstnding that onus of proof does not lie on him- Party cannot rely on abstract doctrine of onus of proof or on the fact that he was not called upon to produce it. "

9. Needless to mention that enormous speaking circumstances against the defendants are available on record, which reinforce the sustainability of the impugned order. Few of them are as under:

(i). Undisputably, defendants did handover 6 cheques under covering letter dated 30th October 1999. The letter, specificially, says that cheques were given by way of part payment against amount due to the plaintiff.

(ii). The letter gives specific assurance that cheques will not be dishonoured, if presented under intimation.

(iii). The plaintiff did send a letter to the defendant on 17.2.2000 before presentation of cheques, informing Defendant No.1 firm him that he is going to deposit the cheques for encashment with his bankers. Letter also records telephonic talk and personal meeting prior to the said letter dated 17.2.2000.

(iv). No reply to the aforesaid letter was given by either the defendants. None of the legal notices were replied by the defendants.

10. At this juncture, facts and circumstances need to be appreciated in the light of normal human conduct.

11. No person muchless businessman would hand over undated cheques unless he is indebted. No businessman will would keep quite for 4 months, if he has not been paid money pursuant to the understanding; which had resulted in handing over 6 cheques to the plaintiff. No person muchless any businessman would keep quite inspite of written intimation by the plaintiff of his intention to lodge the cheques for encashment.

12. No businessman will remain silent if somebody is alleging several telephonic talks and personal meeting with him to demand money, if he has not borrowed money. The conduct of the defendants, especially their silence speak volume against them and in favour of the plaintiff's case.

13. On the above cannvas, is not difficult to hold that the appeal is devoid of any substance. The impugned order is neither perverse nor illegal. The view taken by the learned Single Judge is a reasonable and possible view in the facts and circumstances of the case. Prima facie, each finding recorded and the conclusions drawn are based

on the material available on record. The inferences drawn are based on settled principles of law. The discretion has been exercised judiciously warranting no interference at the hands of this Court. No material is placed on record to prove prima facie defence set up by the dfendants. At any rate, no fault can be found with the impugned order and the appeal is liable to be dismissed.

. Appeal is, thus, dismissed in limine with no order as to costs.

. Period to deposit the amount is extended by another 4 weeks from today.

**(J.P.DEVADHAR,J.) (V.C.DAGA,J.)**